

CITY OF SAN JOSÉ, CALIFORNIA
Department of Planning, Building and Code Enforcement
801 North First Street, Room 400
San José, California 95110-1795

Hearing Date/Agenda Number
P.C. 07-23-03 Item: 4.c.

File Number
CP 02-004

Application Type
Conditional Use Permit

Council District 7

Planning Area
South San José

Assessor's Parcel Number(s)
455-05-014

STAFF REPORT

PROJECT DESCRIPTION Completed by: Carol Hamilton

Location: West side Monterey Road 1220 feet northerly of Curtner Avenue

Gross Acreage: 3.1 Net Acreage: 3.1 Net Density: N/A

Existing Zoning: CG Commercial Existing Use: Restaurant and Drinking Establishment
General

Proposed Zoning: No Change Proposed Use: 24-hour operation of restaurant; operation of drinking establishment until 2:00 a.m.; entertainment and alternating parking

GENERAL PLAN Completed by: CH

Land Use/Transportation Diagram Designation
Heavy Industrial with Mixed Industrial Overlay Project Conformance:
[x] Yes [] No
[] See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING Completed by: CH

North: Industrial IP Industrial Park

East: Multiple-family Residential A(PD)

South: Industrial LI Light Industrial and HI Heavy Industrial

West: Industrial HI Heavy Industrial

ENVIRONMENTAL STATUS Completed by: CH

[] Environmental Impact Report [x] Exempt
[] Negative Declaration circulated on [] Environmental Review Incomplete
[] Negative Declaration

FILE HISTORY Completed by: CH

Annexation Title: Monterey Park No. 78 Date: July 29, 1983

PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

[x] Approval Date: Approved by: _____
[] Approval with Conditions [] Action
[] Denial [] Recommendation
[] Uphold Director's Decision

APPLICANT/OWNER

Olga Rocha
2121 Monterey Road
San José CA 95112

PUBLIC AGENCY COMMENTS RECEIVED

Completed by: Mike Mena

Department of Public Works

None received.

Other Departments and Agencies

See attached memorandum from the Police Department, Fire Department and the Department of Environmental Services.

GENERAL CORRESPONDENCE

None received.

ANALYSIS AND RECOMMENDATIONS

BACKGROUND

This request is for a Conditional Use Permit (CUP) to allow after-midnight operation of an existing legal non-conforming restaurant and drinking establishment (bar) and the addition of entertainment with an alternating parking arrangement. The restaurant and bar were annexed from the County in 1983 as legal non-conforming uses with operation until 12:00 midnight. The site is located within the CG Commercial General Zoning District. The Zoning Code update, effective in February of 2001, required a Conditional Use Permit for entertainment and amortized all legal non-conforming music and dancing incidental to a restaurant or bar, requiring their termination six months from September 28, 2001. This application was filed as result of Code Enforcement action requiring cessation of the entertainment use which was operating without a Conditional Use Permit or Police Entertainment Permit and to allow the late-night operation of the facility. After-midnight operation of a commercial establishment requires a Conditional Use Permit in the CG Commercial District. The applicant is also requesting alternating parking arrangements with the existing industrial uses on the site.

The applicant has indicated the intent to operate as a restaurant and bar with entertainment until 2:00 a.m. and to operate as a restaurant on a 24-hour basis. The entertainment is proposed to include live music and dancing.

The restaurant is located in an existing approximately 5,150 square foot building. Other uses on the project site include industrial businesses in buildings to the north and west of the restaurant. The site is surrounded by industrial uses to the north, south and west and multi-family residential uses are under construction across Monterey Highway to the east.

GENERAL PLAN CONFORMANCE

The proposal is consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of Heavy Industrial with the Mixed Industrial overlay in that the proposed project consists of the minor expansion of an existing legal non-conforming use.

ENVIRONMENTAL REVIEW

The project was found to be exempt from environmental review under Section 15301 of the CEQA Guidelines, which exempts negligible expansions of uses in existing facilities. Based on the analysis below, the proposal is deemed to be a minor expansion of an existing use.

PUBLIC OUTREACH

A Public hearing notice of the Planning Commission hearing on the Conditional Use Permit was mailed to area residents and owners of property with 500 feet of the subject site. Members of the Strong Neighborhood Initiative (SNI) staff have discussed the project with residents of the Washington/Guadalupe SNI area and have reported no neighborhood concerns regarding the proposed use. Staff has received no communication from the general public regarding this proposal.

ANALYSIS

The primary issues associated with this project are conformance with the Council Policies, *Guidelines for Evaluation of Nightclubs and Bars* and *Evaluation of 24-hour Use* and conformance with the parking requirements of Title 20 of the San José Municipal Code.

Guidelines for Evaluation of Nightclubs and Bars

The Council Policy, last revised in 1993, is now somewhat out of date in regard to Zoning Code use categories and requirements. The Code now deals with “entertainment” as a separate use that is allowed in a restaurant, bar or other commercial establishment, subject to a Conditional Use Permit, and does not address “nightclub” as a use category. Nevertheless, the Policy does provide relevant direction in regard to some aspects of the proposed use including land use compatibility, police concerns, noise and time condition.

Use Compatibility

The Policy specifies that new nightclubs and bars should be discouraged from locating adjacent to or near existing residential uses. The project site is surrounded by industrial uses on the west side of Monterey Road, but is located across Monterey from the Tully Gardens affordable housing project currently under construction. In light of the fact that the bar location is existing and the site is separated from the residential use by a six-lane major arterial, staff believes that the expanded hours of operation and the addition of entertainment is acceptable at this location.

Police Concerns

The Policy further specifies that the Police Chief should evaluate all proposals for bars and nightclubs. Although the proposal does not require an additional ABC Permit for sale of alcohol and is therefore not subject to the Caldera Bill, the Police Department has provided information that the site is located in an area that is over the 20% crime index and that has an over-concentration of liquor licenses (see attached memorandum), but has not indicated concern regarding the proposed use or extended hours. The Police memorandum indicates that the proposed Conditional Use Permit is the first step in bringing the site into conformance with the Police Entertainment Permit requirements and specifies that the entertainment and bar should not extend past 2:00 p.m. The Draft Permit has been conditioned accordingly.

Noise and Time Condition

In regard to noise, the Policy indicates that new or renovated facilities should include sound attenuation and that doors and windows should be kept closed during operation of the facility to prevent noise impacts to surrounding uses. Although the facility is existing and renovation is not proposed, staff has included a condition in the Draft Permit requiring that doors and windows be kept closed while the entertainment use is in operation and after 10:00 p.m., and further a condition limiting noise levels at the nearest residential property line in conformance with General Plan Guidelines. Given the location of the entertainment area at the rear of the building furthest from Monterey Road, staff believes that these measures are adequate to protect surrounding uses from potential noise impacts. Staff has also included a five-year time condition in the Draft Permit in conformance with the recommendations of the Policy.

Based on this analysis, staff has concluded that the proposed entertainment use is in substantial conformance with the Council Policy.

Council Policy for Evaluation of 24-hour Uses

The key aspects of the 24-Hour Policy relevant to this project include use separation, lighting, site management and improvements.

Use Separation

The Policy specifies that the closest parking to the door of a late night use should be located a minimum of 300 feet from a residential property, but specifies that the separation may be increased or decreased on a case-by-case basis where mitigating circumstances are involved. The parking for the subject facility is located approximately 150 feet from the residential property to the east. Based on the fact that Monterey Highway, a six-lane major arterial, separates the site from the residential project, staff believes that the use separation is adequate and in conformance with the Policy.

Lighting

The Policy emphasizes the importance of adequate lighting in the parking areas of late night uses. As a result, staff has requested that the applicant include additional building-mounted lighting to improve the safety for patrons using the parking facilities. Although the applicant has indicated a willingness to provide additional lighting and has indicated proposed lighting on the project plans, the lighting description is not sufficiently detailed to allow staff to evaluate its adequacy. Staff has included a revised plan condition in the Draft Permit requiring the submittal of lighting details within 60 days of permit approval.

Site Management

The Council Policy recommends that conditions of approval be included in the permit requiring regular litter maintenance and establishment of a liaison with the Police Department to effectively control any problems that may arise during the late night operation. Such conditions have been included in the Draft Permit.

Site Improvements

The Policy suggests that aesthetic improvements should be considered in the review of proposed 24-hour uses. As part of this project, the applicant is proposing to construct a trash enclosure, improve the existing landscaping and upgrade the site lighting. In addition, staff has included a condition in the Draft Permit requiring that the applicant provide proof of permits for existing roof lighting, or that it be removed.

Based on this analysis, staff concludes that the proposed project substantially conforms to the Council Policy for Evaluation of 24-hour Uses.

Parking

The applicant is proposing alternating parking as a means of meeting the Zoning Code parking requirements. The site plan currently shows 42 on-site parking spaces to serve the restaurant/bar facility and the adjacent industrial uses. Based on the current floor plan, staff has concluded that the proposed restaurant/bar and entertainment require approximately 50 spaces when the facility is in full operation. Staff believes that it would be possible to re-stripe the on-site parking areas to provide 50 spaces. During the day, when the industrial businesses are in operation, a portion of the parking is occupied by the industrial uses and is not available to the restaurant. It is staff's understanding that the applicant is proposing to eliminate use of a portion of the restaurant/bar facility during the daytime hours when the adjacent uses are in operation, but to use all on-site parking after 5:00 p.m. when these businesses are closed. This seems like a workable solution; however, the parking analysis included on the project plans is unclear and does not fully conform to the requirements of the Zoning Code. Furthermore, the applicant has not indicated what portion of the facility will be closed during the day to ensure that parking is adequate. Staff has included revised plan conditions in the Draft Conditional Use Permit requiring that the applicant submit revised plans that include clear and accurate floor area calculations, a correct parking analysis, restriping of the parking lot and a clear proposal for alternating parking which demonstrates conformance with the Zoning Code parking requirements. If the revised plans and information is not submitted within 60 days, the Permit will expire.

Conclusion

Based on the above analysis and the conditions included in the Draft Permit, staff believes that the proposed use can operate in a manner that is compatible with surrounding uses and consistent with City Policy.

RECOMMENDATION

Planning Staff recommends that the Planning Commission approve the Conditional Use Permit and include the following findings and conditions in its Resolution.

The Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended. The project will not have a significant adverse effect on the environment.
2. The application proposes after-midnight operation of an existing legal non-conforming restaurant and drinking establishment (bar) and the addition of entertainment with an alternating parking arrangement. The restaurant and bar were annexed from the County in 1983 as legal non-conforming uses with operation until 12:00 midnight.
3. The site is located within the CG Commercial General Zoning District. The Zoning Code update, effective in February of 2001, required a Conditional Use Permit for entertainment and amortized all legal non-conforming music and dancing incidental to a restaurant or bar, requiring their termination six months from September 28, 2001. This application was filed as result of Code Enforcement action requiring cessation of the entertainment use which was operating without a

Conditional Use Permit or Police Entertainment Permit and to allow the late-night operation of the

facility.

4. After-midnight operation of a commercial establishment requires a Conditional Use Permit in the CG Commercial District. The applicant is also requesting alternating parking arrangements with the existing industrial uses on the site.
5. The applicant has indicated the intent to operate as a restaurant and bar with entertainment until 2:00 a.m. and to operate as a restaurant on a 24-hour basis. The entertainment is proposed to include live music and dancing.
6. The restaurant is located in an existing approximately 5,150 square foot building. Other uses on the project site include industrial businesses in buildings to the north and west of the restaurant. The site is surrounded by industrial uses to the north, south and west and multi-family residential uses are under construction across Monterey Highway to the east.
7. The *Council Policy for Evaluation of Nightclubs and Bars* specifies that new nightclubs and bars should be discouraged from locating adjacent to or near existing residential uses. The project site is surrounded by industrial uses on the west side of Monterey Road, but is located across Monterey from the Tully Gardens affordable housing project currently under construction. In light of the fact that the bar location is existing and the site is separated from the residential use by a six-lane major arterial, the expanded hours of operation and the addition of entertainment are appropriate at this location.
8. The *Council Policy for Evaluation of Nightclubs and Bars* specifies that the Police Chief should evaluate all proposals for bars and nightclubs. Although the proposal does not require an additional ABC Permit and is not subject to the Caldera Bill, the Police Department has provided information that the site is located in an area that is over the 20% crime index and that has an over-concentration of liquor licenses, but has not indicated concern regarding the proposed use. The Police memorandum indicates that the proposed Conditional Use Permit is the first step in bringing the site into conformance with the Police Entertainment Permit requirements and specifies that the entertainment and bar should not extend past 2:00 p.m. The Permit has been conditioned accordingly.
9. The Permit has been conditioned to require that doors and windows be kept closed while the entertainment use is in operation and after 10:00 p.m. and to limit noise levels at the nearest residential property line in conformance with General Plan Guidelines. The Permit includes a five-year time condition.
10. The *Council Policy for Evaluation of 24-hour Uses* specifies that the closest parking to the door of a late night use should be located a minimum of 300 feet from a residential property, but specifies that the separation may be increased or decrease on a case-by-case where mitigating circumstances are involved. The parking for the subject facility is located approximately 150 feet from the residential property to the east. Based on the fact that Monterey Highway, a six-lane major arterial, separates the site from the residential project, the use separation is adequate and in conformance with the Policy.
11. The *Council Policy for Evaluation of 24-hour Uses* emphasizes the importance of adequate lighting in the parking areas of late night uses. The applicant has included additional building-mounted lighting on the project plans to improve the safety of the parking facilities, but has not provided details of the lighting. The Permit includes a condition requiring the submittal of lighting details within 60 days of permit approval.

12. The applicant is proposing to construct a trash enclosure, improve the existing landscaping and upgrade the site lighting. The Permit includes a condition requiring that the applicant provide proof of permits for existing roof lighting, or that it be removed.
13. This permit includes alternating parking as a means of meeting the Zoning Code parking requirements. The parking analysis included on the project plans is unclear and does not conform to the requirements of the Zoning Code; however, it appears that adequate parking can be provided on the site through an alternating parking arrangement. The Permit includes a revised plan condition requiring that the applicant submit revised plans that include clear and accurate floor area calculations, a correct parking analysis, restriping of the parking lot and a clear proposal for alternating parking which demonstrates conformance with the Zoning Code parking requirements. If the revised plans are not submitted to the satisfaction of the Director of Planning within 60 days of Permit approval, the Permit will expire.

The Planning Commission concludes and finds based on an analysis of the above facts that:

1. The proposed project is consistent with the San José 2020 General Plan Land/Use Transportation Diagram designation of Heavy Industrial with the Mixed Industrial Overlay.
2. The proposed project is in compliance with the requirements of the California Environmental Quality Act.
3. The proposed use will be compatible with uses in the surrounding area.
4. As conditioned in this Permit, the proposed use will provide parking in conformance with the Zoning Code.
5. As conditioned, the project is in substantial conformance with the *Council Policies for Evaluation of Bars and Nightclubs and for Evaluation of 24-hour Uses*.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:

1. The proposed use at the location requested will not
 - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
 - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
 - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and
3. The proposed site is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and by other public or private service facilities as are required.

4. Based on the conditions included in the Permit, the number of off-street parking spaces provided in such parking facilities adequately meets the parking requirements of the individual buildings and uses as specified in Chapter 20.90 of the Zoning Ordinance;
5. Based on the conditions included in the Permit, it is reasonably certain that the parking facility shall continue to be provided and maintained at the same location for the service of the building or use for which such facility is required, during the life of the building or use; and
6. Based on the conditions included in the Permit, the parking facility is reasonably convenient and accessible to the buildings or uses to be served.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS PRECEDENT

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be **signed, notarized, and returned** to the Department of City Planning within **60 days** from the date of issuance of the resolution granting the permit. *Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit.* Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara must be submitted along with the Acceptance Form.
2. **Plan Revisions.** Within 60 days of the issuance of this permit and prior to recordation, the applicant shall revise the project plans to include the item(s) listed below to the satisfaction of the Director of Planning. Failure to provide said revisions within 60 days shall render this permit null and void.
 - a. Provide accurate floor area calculations for entertainment and dining areas.
 - b. Provide a parking analysis in conformance with the requirements of the Zoning Code demonstrating the adequacy of on-site parking.
 - c. Provide a revised parking striping plan that provides parking in conformance with the Zoning Code requirement.
 - d. Provide a clear proposal for alternating parking by reflecting the proposal in the parking analysis, providing a narrative program and, if the proposal includes the closure of a portion of the facility during the daytime, by indicating the area to be closed on the floor plan.

- e. Provide details of the proposed lighting fixtures.
- f. Revise plans to clearly show site boundaries and all property lines.

CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
2. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
3. **Conformance with Plans.** Construction and development shall conform to approved Planned Development Plans entitled, "Tutti's Bar and Restaurant" as revised in Precedent Condition No. 2, on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
4. **Sign Approval.** No signs are approved at this time. All signs shall be subject to approval by the Director of Planning.
5. **Refuse.** All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed/permitted unless designated on the approved plan set. Trash areas shall be maintained in a manner to discourage illegal dumping.
6. **Hazardous Materials.** Any hazardous materials regulated by Chapter 17.68 of the San José Municipal Code on the site must be used and stored within approved buildings and/or within areas specified on the approved plan set, if any, in full compliance with the City's Hazardous Material Ordinance and the Hazardous Materials Management Plan for the site approved by the San José Fire Prevention Bureau.
7. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings, fences, and wall surfaces within 48 hours of defacement.
8. **Anti Litter.** The site shall be maintained free of litter, refuse, and debris.
9. **Parking Limitations.** The entertainment use shall be allowed only so long as parking in conformance

with the Zoning Code requirements is available to serve the use.

10. **Use Limitations.** The entertainment and drinking establishment uses shall not extend later than 2:00 a.m. The restaurant may operate on a 24-hour basis.
11. **Age Limitations.** No person under 21 years of age shall be allowed in the facility during any time that the entertainment, including dancing, is provided.
12. **Entertainment Permit.** The applicant shall obtain an Entertainment Permit from the Police Department prior to implementing the entertainment or after midnight use. The applicant shall operate the facility in conformance with the Entertainment Permit.
13. **Police Liaison.** The applicant shall establish and maintain a liaison with the Police Department and work cooperatively with the Police in communicating and resolving any security or crime problems associated with the use.
14. **Noise.** The sound level generated on this site shall not exceed 55 dba DNL at any property line of property used for residential purposes and shall not exceed 60 dba DNL at any property line of property used for commercial purposes and shall not exceed 70 dba DNL at any property line used for industrial purposes. The doors and window of the facility shall be kept closed during any time that entertainment, including dancing, is provided and after 10:00 p.m. Mechanical ventilation shall be provided sufficient to allow the doors and windows to be kept closed.
15. **Building Clearance for Issuing Permits.** The applicant shall obtain building permits prior to construction on the project site. Prior to the issuance of a Building Permit, the following requirements must be met to the satisfaction of the Chief Building Official:
 - a. *Construction Plans.* This permit file number, CP 02-004, shall be printed on all construction plans submitted to the Building Division.
 - b. *Americans With Disabilities Act.* The applicant shall provide appropriate access as required by the Americans With Disabilities Act (ADA).
 - c. *Emergency Address Card.* The project developer shall file an Emergency Address Card, Form 200-14, with the City of San José Police Department.

CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the

validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.

2. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.100, Title 20 of the San José Municipal Code it finds:
 - a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
 - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
 - c. The use as presently conducted creates a nuisance.
3. **Time Limit.** This Conditional Use Permit expires and has no further force or effect five years from the date of this Permit. **PLEASE NOTE THAT THIS CONDITIONAL USE PERMIT HAS BEEN GRANTED FOR A PERIOD OF FIVE YEARS ONLY. YOU ARE BEING SPECIFICALLY AND SEPARATELY ADVISED OF THIS TIME LIMITATION SO THAT YOU WILL CONSIDER THIS TIME LIMITATION IN YOUR DECISION TO ACCEPT THIS PERMIT OR AS YOU MAKE ANY INVESTMENT DECISION RELATED TO THIS PROPERTY.**
4. **Renewal.** The permit holder may seek renewal of a time-conditioned Conditional Use Permit by filing a timely renewal application on the form provided by the Director of Planning. In order to be timely, an application for renewal must be filed more than 90 calendar days but less than 180 calendar days prior to the expiration of the Conditional Use Permit. Once a renewal application has been filed in a timely manner, the expiration date of the Conditional Use Permit is automatically extended until either the issuance or denial of the application for renewal has become final.